Supreme Court, U.S.
FILED
DEC 09 1982
ALEXANDER L. STEVAS
CLERK

No. 82-637

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

SAVE THE VALLEY, INC.,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Section 307(f), 42 U.S.C. § 7607(f) (Supp. IV 1980) *passim*

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The United States Brief in Opposition (received December 17, 1982), raises several points warranting summary reply. First, the Court's grant of certiorari in *Gorsuch* v. *Sierra Club*, No. 82-242, on October 18, 1982, a case involving the corollary statutory issue of the proper standard for attorney's fee awards under the Clean Air Act favors consolidation of this case with *Sierra Club* or deferral of a decision on certiorari until *Sierra Club* is decided. Second, the failure of the U.S. Court of Appeals for the Sixth Circuit to explain its denial here warrants review because section 307(f) of the Clean Air Act will not function as Congress intended without such explanations. Failure to explain fee denials has a chilling effect on citizen suits and makes it far more difficult for Congress to oversee the operation of the Clean Air Act's fee provisions and amend them as needed. Third, the technical objections to review raised by the United States, Brief in Opp. at 9-15, are not valid and do not detract from the merit of this petition. Petitioner was forced to

raise its clean air complaints in the Clean Water Act context because of the government's concededly improper attempt to impose air pollution controls in an environmental impact statement (EIS) concerning the Clean Water Act permit. The United States should not now be allowed to argue that EPA's unlawful attempt to shift permit conditions into an EIS bars the award of fees or precludes certiorari. Finally, the United States makes several mistaken assertions of fact about documentation of fees submitted in the court below. The record before the court of appeals is appropriate for review.

1. The United States concedes, as it must, that the proper standard for the award of attorney's fees under the Clean Air Act is an issue warranting review by this Court. That issue is squarely presented by this case as well as *Gorsuch* v. *Sierra Club*, *supra*. Under the circumstances, the Court should either delay decision on the writ of certiorari until it decides *Sierra Club* or consolidate this case with *Sierra Club* for argument.

Consolidation would present the Court with a case where petitioners obtained *some* clean air relief, as well as a case—*Sierra Club*—where petitioner obtained none. If the Court adopts the government's position in *Sierra Club* that one must obtain some tangible clean air relief in order to be eligible for attorney's fees, review of this case would allow the Court to provide guidance as to what kind and how much relief must be obtained to make a party eligible for at least *some* fees under section 307(f) of the Clean Air Act.

Consolidation would also permit the Court with cases representative of the two types of litigation Congress intended to encourage by enacting section 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f) (Supp IV 1980): review in *Sierra Club* of EPA regulations, and review in this case of individual air pollution permit decisions. Two courts of appeals have ruled that unsuccessful or partially successful litigants may obtain fees in such litigation.

Sierra Club v. *Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982), *cert. granted*, No. 82-242 (October 18, 1982) (review of regulations); *Northern Plains Resources Council* v. *EPA*, 670 F.2d 847 (9th Cir. 1982) (air pollution permit challenge). The United States asks this Court to reverse this standard for both kinds of litigation, even though the Court has only the first kind—review of regulations—before it. The Court would be better served by reviewing this case and *Sierra Club* together.

2. The United States argues that the Court should not grant certiorari here because the Court of Appeals issued no opinion. In arguing that the failure to issue an opinion is merely a matter of docket management, the United States ignores the particular role Congress assigned the courts of appeal under section 307 of the Clean Air Act. That provision is novel in that it mandates direct review by the courts of appeal of decisions of the Environmental Protection Agency and thus the courts of appeal (and not district courts) act as triers of fact on the issue of attorney's fees. For this reason, a court of appeals' decision on such fee petitions differs substantially from appellate review of fee award decisions under statutes where summary disposition might be proper. *See Consolidated Freightways, Inc. v. Kassel*, No. 79-1618 (Feb. 23, 1982) (White, J., dissenting from dismissal of certiorari) (summary disposition of 42 U.S.C. § 1988 attorney's fee petition). The trier of fact must give some explanation when it denies attorney's fees, Petition for Certiorari at 18, particularly where, as here, the fee applicant is entitled to some fee award under statute and governing case law. *See Northern Plains Resources Council* v. *EPA*, 670 F.2d 847 (9th Cir. 1982) (entitlement to fees in unsuccessful cases brought under section 307(f) to review PSD permits); *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (award or explain fee denial where otherwise entitled under Civil Rights Act of 1964).

The instant facts compelled an explanation by the Court of Appeals of its decision to deny fees under section 307 (f). The fee applicant, as a result of the litigation, has caused actual improvements in clean air protection. As the United States argues forcefully on the merits of *Sierra Club*, Congress meant to reward "litigants who actually aid in agency implementation by using the judicial process to correct errors," United States Brief at 37, and thus further the primary goal of the Clean Air Act: "to protect and enhance the quality of the Nation's resources . . .", 42 U.S.C. § 7401(b)(1). United States Brief at 30.

Unless courts of appeal explain their fee decisions in cases like this one, the resultant uncertainty will discourage meritorious suits brought under section 307(f), and frustrate Congress' purposes in enacting that provision. Potential litigants cannot know the standard which will actually be applied to fee awards in their cases unless some explanation is given. Implementation of substantive provisions of the Clean Air Act will suffer as a result.

The United States argues that a court's failure to explain fee denials is unimportant. That argument ignores both the special purpose of section 307(f), and the important congressional role which such opinions play. Failure to explain fee decisions impedes Congress' efforts to determine if section 307(f) is being properly implemented. Congress added section 307(f) to the Clean Air Act in 1977 to resolve a split among the circuits about the availability of attorney's fees in the courts of appeal. *Compare Natural Resources Defense Council* v. *EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973) *with Natural Resources Defense Council* v. *EPA*, 539 F.2d 1068 (5th Cir. 1976) *and Natural Resources Defense Council* v. *EPA*, 512 F.2d 1351 (D.C. Cir. 1975). The United States has argued that Congress has "ample tools at its command to conduct its own reevaluation of the Act." United States Brief in *Sierra Club* at 32. But it is dif-

ficult to see how Congress can reevaluate section 307(f) unless the courts of appeal explain how the fee provision is applied in individual cases.

The United States also suggests that there is no need to grant certiorari where there is no showing that the courts of appeal have abused the use of such summary dispositions. That argument ignores the fact that there have been summary denials in five of the nine decisions on fee applications under section 307(f) during the year before this petition was filed.[1] Furthermore, the United States cited two such cases to the court below as authority for the proposition that the court of appeals could deny fees without opinion. United States Brief at 33-34 (May 14, 1982). The courts of appeal appear to be developing two standards which govern fee awards under section 307(f), one for published cases under which unsuccessful or partially successful parties recover fees, and another for unreported cases, where such parties do not. Use of summary denials by five circuits in five of the nine recent cases concerning fees under section 307(f) indicates that the practice is common and, given its conflict with the special purpose of section 307(f) of the Clean Air Act, important for the Court to review.

3. The United States' argument, Brief in Opp. at 9-13, that this was "really" a Clean Water Act case ignores

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[1] *Compare* Save The Valley v. EPA, No. 82-637 (filed Oct. 13, 1982); Manchester Environmental Coalition v. EPA, 672 F.2d 998 (2d Cir. 1982) (unreported order denying fees entered April 9, 1982), No. 82-247, cert. denied (Nov. 29, 1982); Town of Brookline v. Gorsuch, 667 F.2d 215 (1st Cir. 1981) (unreported order denying fees entered Jan. 13, 1982); American Petroleum Institute v. Costle, 665 F.2d 1176 (D.C. Cir. 1981) (unreported order denying fees entered Oct. 27, 1981); City of Seabrook, Texas v. EPA, 659 F.2d 1349 (5th Cir. 1981) (unreported order denying fees entered Oct. 15, 1981) *with* Florida Power & Light Co. v. Costle, 683 F.2d 941 (5th Cir. 1982); Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir. 1982), No. 82-242, *cert. granted* (Oct. 18, 1982); Alabama Power Co. v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982); Northern Plains Resources Council v. EPA, 670 F.2d 847 (9th Cir. 1982).

one key fact: EPA's illegal attempt to control air pollution by stipulation instead of enforceable permit conditions forced petitioner into the lengthy proceedings to obtain the enforceable clean air relief to which it was legally entitled. EPA first publicly proposed putting proper conditions in the air pollution permit,[2] then indicated that such enforceable conditions would be placed in the water pollution permit, and finally shunted them into the unenforceable EIS stipulation. Petitioner pursued the clean air issues under the framework EPA had established for review of the permits for the involved power plant and eventually obtained enforceable clean air protections. The Court should consider a case where petitioner obtained enforceable clean air relief as an appropriate one to review on the issue of the standard for attorney's fees under the Clean Air Act.

The United States argues that petitioner failed to support its fee request adequately. The United States' assertion that petitioner spent most of its time in administrative proceedings is demonstrably wrong. Petitioner spent more than 1,000 hours on this case, Petition at 7 n.4, of which only 202.5 were in the adjudicatory proceedings conducted under the court of appeals' continuing supervision. Petition at 6 n.3. The United States' other complaints about rates and documentation were equally unfounded.[3]

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[2] EPA proposed the standby use of low-sulfur coal in the air permit. Petition for Certiorari at 3.

[3] After examining Petitioner's verified billing sheets, the EPA questioned the documentation for 12.75 out of over 1,000 hours, United States Brief at 41-42 (May 14, 1982) and complained that rates were insufficiently documented, even though these were the market rates charged numerous commercial clients for environmental law work. United States Brief at 37-38 (May 14, 1982). Petitioner further explained these hours and rates in its reply brief and supplemental affidavits. Petitioner's Reply Brief at 16-22 (May 27, 1982); Second Affidavit of Duane A. Siler. Petitioner

CONCLUSION

This case should be consolidated for decision with *Gorsuch* v. *Sierra Club*, *supra*, or, alternatively, deferred pending the Court's decision in that case.

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December 1982

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met its burden of proof under National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982), and EPA offered no evidence of its own (and sought none) to show that the time, rates, or documentation were improper.